No. 203

OCTOBER TERM, 1921

Supreme Court of the United States

THE SOUTH COVINGTON AND CINCINNATI STREET RAILWAY COMPANY AND THE SUBURBAN ELECTRIC COMPANY,

Appellants,

vs.

THE CITY OF NEWPORT, KENTUCKY,

Appellee.

Reply Brief for Appellants

The only matter involved is the jurisdiction of the District Court as a Federal Court.

The court found in its decree (R. 18)

> "that the matters and things set out in the pleadings in said cause do not present a controversy arising under the laws or Constitution of the United States and that this court is without jurisdiction of the same."

The court certified (R. 19)

> "that the judgment of dismissal herein is based solely on the ground that the matters and things set out in the pleadings herein do not present a controversy arising under the Constitution or laws of the United States and that this court is without jurisdiction of the same."

The only question before the court, therefore, is whether the District Court had jurisdiction to hear and decide the case. Judicial Code, § 238.

Counsel for appellee says on page 4 of this brief:

> "There is nothing in the record showing that the appellee will remove or attempt to remove the wire, or take any action in this respect other than the mere adoption of the resolution. Appellants must rest the question of jurisdiction upon its adoption."

Counsel is in error in this statement. While the resolution standing alone would support jurisdiction, it does not stand alone. The jurisdiction depends on the allegations of the bill (*Columbus Ry. & Power Co. v. Columbus*, 249 U. S. 399, 406). The bill alleges not only the adoption of the resolution, but the purpose of the city to take forceable action thereunder. (R. 5)

> "that unless restrained by this court defendant will forcibly remove and destroy said wire thereby interfering with the operation of the street railway system and the electric lighting and power system above described, causing plaintiffs' injury which can not be compensated in money and to their irreparable damage."

The purpose of the city in this respect was so well understood that the answer of the city filed on February 8, 1918, more than two months after the bill was filed, did not deny the above quoted allegation of the bill as to the purpose of the city. That allegation stood admitted for ten months longer, until December 6, 1918, when the amended answer set up for the first time the then purpose (December 6, 1918) of the city to seek the enforcement of the ordinance only by proceedings in court.

However, as the jurisdiction of the court rests on the allegations of the bill, the city's answer, whether prompt or belated, can not oust that jurisdiction.

Counsel suggests on page 5 of his brief, but does "not urge" that the resolution here involved could not "have the effect of repealing an ordinance or of nullifying any rights granted under an ordinance"; that in order to be a state law, within the meaning of the Constitution, "it must be a valid resolution, adopted by the municipality under a proper grant of power."

There are obvious reasons why counsel can not urge this contention.

The bill alleges that the resolution was adopted by the Board of Commissioners of the city. It is clear from the Statutes of Kentucky (§ 3235 e-12; see our main brief, p. 17) that the Board of Commissioners has all the legislative power of the city. The bill alleges that the resolution is an impairment of plaintiffs' rights "in violation of Article I, Section 10 of the Constitution of the United States, and is a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment," etc.

There is no distinction, material in this case, between an ordinance and a resolution. (*Robertson* v. *Southern Bitulithic Co.*, 190 Ky. 314.)

The answer of the city alleges (R. 13):

> "Defendant says that said resolution of the Board of Commissioners of the City of Newport described and complained of in the bill herein was passed in the exercise of the general Police Powers of the City of Newport, and that the removal of said wire was deemed by said Board of Commissioners to be necessary to secure the safety of the lives and property of the citizens and inhabitants of the City of Newport."

Counsel can hardly contend that the resolution in question is not a complete exercise of the city's legislative power in view of the foregoing allegation of the answer that it is an exercise of the police powers of the city, and of the allegation in his amended answer that the city proposes to seek the "enforcement of said resolution" in the Campbell Circuit Court. If it is not an enactment by the city, it could not be enforced even by a suit in court.

The court below said (R. 17):

> "There can be no doubt that the resolution complained of is a state law within the meaning of Section 10 of Article I of the federal constitution."

The contract clause of the Constitution is directed against

> "every form in which the legislative power of a State is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the State exercising delegated legislative authority."
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> *Ross* v. *Oregon*, 227 U. S. 150, 162.

It is not very important to determine whether the resolution in question is technically "a law of the state." The bill asserts that the action of the city amounts also to a taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment.

If the governing body of the city adopts such a resolution, and, as alleged in the bill, the city proposes to enforce it by forceable removal of the wires, a case is made under the Fourteenth Amendment, whether the action be legislative or executive.

An arbitrary or unreasonable exercise of the police power may be enjoined by a court of equity as a violation of the Fourteenth Amendment (*Dobbins* v. *Los Angeles*, 195 U. S. 223); and the prohibition of that amendment refers to

> "all the instrumentalities of the State, to its legislative, executive and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.'"
>
> *Chicago, Burlington, etc., R. R.* v. *Chicago*, 166 U. S. 226, 233.

Counsel for the city, in his brief, relies principally on two decisions by the District Court for the Northern District of Alabama, *American Telephone & Telegraph Co.* v. *Town of New Decatur*, 176 F. 133, and *Southern Bell Telephone & Telegraph Co.* v. *Birmingham*, 211 F. 709. Neither of these cases is in point in the case at bar.

In *American Telephone & Telegraph Co.* v. *Town of New Decatur*, 176 F. 133, it appeared that the town had adopted an ordinance repealing a prior telephone franchise and directing the removal of the poles and wires of the company erected thereunder. On the same day and about a week later, and before suit was brought in the Federal Court, the city adopted resolutions directing the attorneys for the city to institute legal proceedings to require the removal of the poles and wires, etc. The suit of the company in the Federal Court was, in effect, to enjoin the in-

stitution of such legal proceedings by the town. As the court said (141):

> "The passage of a resolution authorizing the institution of a suit to compel removal is inconsistent with a purpose to proceed under an earlier resolution to remove by force and without suit. The bill also avers, 'that, in pursuance of the ordinances and resolutions passed by the board of aldermen of the city of New Decatur, as hereinabove set forth, the said city authorities of the said city intend forthwith and without delay to take steps to force orator to remove its poles and wires from the public streets of said city.' The averment is that the removal was to be forced pursuant to the ordinances and resolutions set out in the bill; that is, by filing legal proceedings to compel their removal. No acts or threats of defendant are averred or relied on other than the ordinances and resolutions set out in the bill, as indicating a purpose on its part to resort to violence. Construing the resolutions and ordinances as an entirety, the only action reasonably to be expected to be taken by the town authorities was a suit in court. This case is, therefore, identical with the case of *Des Moines City Railway Co., supra;* and controlled by it. For the reasons stated, the court is without jurisdiction."

Of course the decision just quoted is not authority in this court and we will not attempt to analyze it at length, but limiting it to its facts, and considering the gist of the decision as just quoted, it is evident that it is not applicable to the case at bar.

In *Southern Bell Telephone & Telegraph Co.* v. *City of Birmingham*, 211 F. 709, the city passed an ordinance undertaking to repeal a prior ordinance fixing certain agreed rates for telephone service. The company contended that the second ordinance impaired the obligations of the

original contract. The court held that it did not, because the new ordinance did not undertake to fix any rates or to prevent the company from charging the rates named in the alleged contract. The court said (pp. 713-714):

> "The ordinance complained of in the bill in this case fixes no rate to be observed by the plaintiff. It merely declares void a contract which fixed rates. It leaves the plaintiff at liberty to fix its own rates, subject to liability only if they are unreasonable. It seeks to deprive the plaintiff of the protection of the agreement, but otherwise leaves it unhampered. The plaintiff can still put in force the increased rates. Its effect is therefore limited to repudiation of the contract and it comes within the line of cases which holds that a mere declaration of repudiation of a contract is not action impairing the obligation of a contract, rather than within the other line of cases, relied on by the plaintiff, in which the ordinances prescribed, in addition, action looking to the enforcement of the contract."

It is clear that this case is inapplicable to the case at bar. The opinions in the two cases—by the same judge—must be read with reference to the facts with which the court was dealing. The theme which runs through the two opinions is (176 F. 137):

> "The rule is well settled that an ordinance or resolution of a municipality, the effect of which is merely to deny liability upon or repudiate a contract, and which creates no antagonistic rights or duties, is not impairing legislation, though the contract repudiated is valid and binding." (See also 211 F. 710.)

Without adopting this generalization, we claim that it supports, rather than opposes our position.

The resolution of the City of Newport does not "merely deny liability upon or repudiate a contract." It recites that the wire which the bill alleges was rightfully erected, has become "dangerous to life and property" and that its removal "is necessary to secure the safety of the lives and property of the citizens" and "directs" its removal, "in the exercise of the general police powers of the City of Newport." (Answer of city.)

Such a resolution certainly "creates antagonistic rights or duties," *i. e.*, antagonistic to the alleged contract, and this comes within the quoted definition of "impairing legislation."

It purports to create by its finding that the wire is a public nuisance, the "right" on the part of the city to require the removal of the wire, and by its order of removal the "duty" on the part of the company to remove it.

In the case last mentioned (211 F. 709), the court, in differentiating the case of *Iron Mountain Railroad Co.* v. *Memphis*, 98 F. 113, uses language which is equally applicable to the case at bar. The court says (p. 713):

> "In the case of *Iron Mountain R. R. Co.* v. *Memphis*, the ordinance declared the forfeiture of a franchise to occupy a street with railroad tracks, and, as the court held, authorized a re-entry of the city upon the premises in possession of the railroad. Its effect, if enforced, was to dispossess the railroad of property in its possession, and it was to prevent this enforcement and the consequent dispossession of the railroad, that it was held entitled to relief. In the case at bar the ordinance authorizes no interference or disturbance of the plaintiff or its property or franchise, but merely attempts to declare invalid a contract."

So in the case at bar the effect of the Newport resolution, if enforced, "was to dispossess the railroad of prop-

erty in its possession" and it is "to prevent this enforcement and the consequent dispossession of the railroad" that it is "entitled to relief."

In *St. Paul Gas Light Co.* v. *St. Paul*, 181 U. S. 142, which is the principal authority relied on in the two District Court decisions above referred to, the Light Company brought suit in the state court against the City of St. Paul to recover interest on the cost of certain lamps constructed and placed by the Light Company on the streets of St. Paul. Its claim was based on a section of its legislative charter. The city had denied its liability by ordinance. The trial court decided in favor of the company. It was reversed by the Supreme Court of the state, which decided in favor of the city.

This court held that the ordinance of the City of St. Paul denying its liability to pay interest under the charter was not legislation impairing the contract; that the ordinance did not in any way affect the contract right of the plaintiff to recover such interest and had no greater effect thereon than an answer filed by the city in the case; that therefore there was no constitutional question involved and that this court had no jurisdiction over the writ of error from the Supreme Court of the State of Minnesota. This court said on page 149:

> "The other provision in question created no new right or imposed no new duty substantially antagonistic to the obligations of the contract, but simply expressed the purpose of the city not in the future to pay the interest on cost of construction of the lamp posts which were ordered to be removed. That is to say, it was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payments."

In *Northern Pacific Railway Co.* v. *Duluth*, 208 U. S. 583, the *St. Paul case* was discussed and distinguished. In the *Duluth case* the Railroad Company had constructed a viaduct over Lake Avenue in Duluth under a contract whereby the city undertook for a period of fifteen years to maintain that part of the bridge over the railroad's right of way and to perpetually maintain the approaches, the Railroad Company having paid the greater part of the cost of construction.

Before the expiration of the fifteen years the City of Duluth passed a resolution requiring the Railroad Company to make certain repairs to the viaduct. An action was brought by the city in the state court to enforce the resolution and require the company to make the repairs. The company set up its contract and claimed that the resolution was an impairment and in violation of the Federal Constitution. The state court held that the resolution was a proper exercise of the police power of the city and ordered the company to make the repairs. The Supreme Court of the state affirmed the judgment. The case was taken on error to this court and the city denied the jurisdiction of this court on the ground that the resolution complained of was not a resolution impairing the obligations of the contract. This court, however, held that it had jurisdiction, saying on page 591:

> "We think the municipal legislation complained of in this case amounts to more than a mere denial of liability or of the binding force of the former contract. The legislation which deprives one of the benefit of a contract or adds new duties or obligations thereto necessarily impairs the obligation of the contract, and when the state court gives effect to subsequent state or municipal legislation which has the effect to impair contract rights by depriving the parties of their

benefit, and make requirements which the contract did not theretofore impose upon them, a case is presented for the jurisdiction of this court."

Also, on the same page:

"But recurring to the resolution in this case, we are of the opinion that it is legislative action which impairs the obligation of the contract, if the contract is of binding force, which is a question to be determined upon the merits. For the judgment of mandamus against the railroad company could not have been rendered in this case without the prior legislation by the city ascertaining the necessity for repairs upon the viaduct, the character and extent of the same, and imposing upon the railroad company the duty to enter upon the street and construct the improvement.

This municipal action is more than a mere denial of the obligation of the contract; it affirmatively requires that certain improvements shall be made upon the viaduct by the railroad company which the council deemed to be necessary. It required legislative action to determine the nature and character of these improvements. The mandamus issued by the court is but the carrying of the ordinance into effect. If the contract was of binding force and effect it would relieve the railroad company from making such improvements within the right of way for the period of fifteen years and permanently relieve it of other improvements upon the viaduct. To require that it shall make these improvements within the period named, as this legislation does, is to require the railroad to incur expenses for things which the city had expressly contracted to relieve it from during the period mentioned. Assuming for jurisdictional purposes that the company had a valid claim of contract, it was impaired by the legislation of the city in question, we therefore think there is jurisdiction in the case."

Applying this language to the case at bar, if the appellants had the contract right to erect and maintain the wire as alleged in the bill, it required legislative action by the City of Newport to find and determine that the wire was a danger to the safety of persons and property in the City of Newport and to order its removal. Such was the purpose of the resolution involved in this case. The resolution itself would be the necessary foundation either for forceable removal by the city officials, or for a suit in court to order the removal of the wire.

If, as alleged in the bill, such attempted exercise of the police power of the city was unreasonable, arbitrary and unwarranted in fact, then the resolution itself is an impairment of the contract and a taking of property without due process of law.

The question of the character of the resolution in this respect is the same whether the jurisdiction of the District Court, or the jurisdiction of this court on error to a state court, is involved.

Reference is also made in the quotations in the brief for the city to *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. That case involved only the refusal of the City of Dawson to pay for water under a contract with the Water Works Company. It was held by this court to involve the same question decided in *St. Paul Gas Light Co.* v. *St. Paul, supra.*

The case of *Des Moines* v. *Des Moines Street Railway Co.*, 214 U. S. 179, is discussed in our main brief. An additional comment on that case is suggested by a consideration of the cases above referred to.

In the *Des Moines case* the resolution did not purport to terminate the contract rights of the Railway Company. It merely recited a controversy as to such contract rights and directed the City Solicitor to bring an action to en-

force the city's position with reference to such contracts. The city did not claim that the resolution in question terminated the rights of the Street Railway Co. It merely sought to obtain an adjudication in court of the rights of the city prior to the passage of the resolution.

The resolution in that case, so far as it directed the company to remove the tracks, was analogous to a notice to a lessee under an expired lease. Such notice would not create the lessor's right to repossession, it would merely put the lessor in a position to bring suit and in such a suit he would not be enforcing the notice but would be enforcing the rights which he has claimed in the notice.

In the case at bar, however, the right of the city, if any, to have the wire removed must be based on the resolution, which, as a claimed exercise of the city's police power, declares the wire dangerous and orders its removal.

We desire to call attention to certain decisions not referred to in our original brief.

In *North American Storage Co.* v. *Chicago*, 211 U. S. 306, 314, the court said:

> "The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the Fourteenth Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits."

See also *Pacific Ry. Co.* v. *Los Angeles*, 194 U. S. 112, 117-118.

In *City of Mitchell* v. *Dakota Central Telephone Co.*, 246 U. S. 396, the court upheld the jurisdiction of the District Court to enjoin, at the instance of the Telephone Company, the enforcement of a resolution of the City of Mitchell directing the company to remove its poles, wires, etc., from the streets. The order of removal in the resolution (p. 413) is not materially different from that involved in the case at bar, and the case seems to be decisive of this case.

Speaking of the jurisdiction the court said (406):

> "The first proposition needs but little comment. The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances and hence invoked against the city the contract clause of the Constitution of the United States and also, on account of the asserted destruction of its property, urged in its protection the due process clause. The city combated both propositions.

In *Cincinnati* v. *Cincinnati & Hamilton Traction Co. et al.*, 245 U. S. 446, the ordinance complained of recited the termination of the rights of the traction companies and set forth the terms upon which alone they could continue a day to day operation, providing expressly that in case the companies affected should fail to comply with the terms of the ordinance the City Solicitor was to take the necessary legal proceedings to enforce the ordinance. The answer of the city promptly denied any intention to interfere with or prevent the operation of the companies and alleged that enforcement of the ordinance would be sought only by an order of court.

This court upheld the jurisdiction of the court below but modified the judgment of the court below so as to limit

the city to enforcement of the ordinance by proceedings in court.

We submit that the remedy to be granted in this case should not be so limited because there is in the case at bar no such instruction in the ordinance to the City Solicitor to enforce the resolution by proceedings in court. Here there is an unqualified denunciation of the wire as a public danger and the peremptory direction to remove it, coupled with the sworn allegation of the bill that the city would, unless enjoined, remove the wire by force. The jurisdiction of the District Court was thus invoked for a complete adjudication of plaintiffs' rights, and if those rights were found to be as plaintiffs claimed, an injunction against any form of interference therewith.

All of which is respectfully submitted,

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